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Supreme Court, U.S.
FILED

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No. 08-

In The
SUPREME COURT OF THE UNITED STATES

Christa Marie Labbe, (Agency No.40-136-414)
Petitioner,

vs.

Michael B. Mukasey, US Attorney General
Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

By: Sandra Greene, Esquire
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Christa Labbe

QUESTION PRESENTED

Federal courts are permitted to review constitutional challenges to agency action, even those which arise in the context of an agency's exercise of discretion as it is not within an agency's discretion to violate the constitutional rights of a litigant. This court addressed this issue in the context of habeas proceedings in *INS v. St. Cyr*, 121 S.Ct 2271 (2001) finding that federal courts do, in fact, have jurisdiction to consider such constitutional challenges.

The Circuit Court below asserted that it lacked jurisdiction to consider the Petitioner's challenge to the adverse action of the agency because the constitutional challenge was raised as a "bare allegation" and failed to state a colorable constitutional violation.

The question presented is:

Whether the Court of Appeals properly asserted that it lacked jurisdiction to adjudicate the Petitioner's appeal due to her failure to present a constitutional challenge to the decision of the Board of Immigration Appeals which denied the Petitioner's appeal of the entry of an order of removal against the Petitioner, where the Petitioner's notice of appeal raised a constitutional challenge to the defective manner in which the immigration court prepared the subpoena needed to obtain evidence in support of the Petitioner's relief application, where adverse decision of the immigration judge was based substantially upon

its failure to receive the evidence requested by the subpoena and where Petitioner's former counsel was not provided an opportunity to correct the errors in the subpoena so as to obtain the evidence in question prior to the entry of the order of removal.

CORPORATE DISCLOSURE STATEMENT

Christa Marie Labbe is an individual and has no corporate involvement relevant to these proceedings.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Christa Marie Labbe, respectfully petitions for a writ of *certiorari* to review the decision below judgment of the United States Court Of Appeals for the Third Circuit.

OPINIONS BELOW

The opinions of the Court of Appeals below are unreported and are reprinted at *Appendices A*, and *B* herein, dated September 21 and November 20, 2007, respectively, and the opinion of the Board of Immigration Appeals is reprinted at *Appendix C*, dated May 13, 2004 .

JURISDICTION

The decision of the Circuit Court on Petitioner's Petition for Rehearing was entered on November 20, 2007. Judgment of the Circuit Court on the original appeal was entered on September 21, 2007. The jurisdiction of this court is invoked pursuant to 28 USC sections 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the ***Immigration and Nationality Act***, are found at 8 United States Code, section 1252(a)(2)(C). The relevant statutory provisionis set forth as follows:

C) Orders against criminal aliens

1.Notwithstanding any other provision of law (statutory or nonstatutory) including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182 (a)(2) or 1227 (a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227 (a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227 (a)(2)(A)(i) of this title.

PARTIES TO THE PROCEEDINGS

Petitioner is Christa Marie Labbe a native and citizen of the nation of Haiti. Respondent is Michael B. Mukasey, the Attorney General of the United States.

STATEMENT OF THE CASE

1. Statutory Background-

The US Court of Appeals for the Third Circuit has dismissed the Petition for Review of Petitioner, Christa Labbe, upon its assertion that it lacks jurisdiction to consider her appeal as she is defined as a criminal alien without the right to seek judicial review, pursuant to 8 USC section 1252(a)(2)(C). The Petitioner challenges this determination as she asserts that the Court of Appeals has authority to review asserted constitutional violations such as she asserted in her petition for review. Specifically, the Petitioner asserted that the Respondent erred and otherwise violated her right to due process when the immigration court prepared a defective subpoena in full knowledge that the subpoena was needed for Petitioner to obtain evidence necessary to challenge the Respondent's removal efforts. As was fully knowable to the Respondent in advance, the defective subpoena was rejected and the needed evidence was not tendered. Petitioner's former counsel was not given a sufficient notice of the defect nor an opportunity by the Respondent to correct the defect and seek the needed evidence prior to the time in which the Respondent entered a final order of removal against the Petitioner.

Notwithstanding the fact that the Petitioner's notice of appeal to the Board of Immigration Appeals cites this issue as sufficient grounds for the appeal, the

Court of Appeals asserted that it had no jurisdiction to consider the Petitioner's
petition for review because no constitutional issue challenge was presented in the administrative proceedings. Although the Immigration and Nationality Act, at section1252(a)(2)(C) does not acknowledge a constitutional claim exception, the Court of Appeals noted that its case law, namely, *Cruz v. Attorney General*, 452 F.3d 240 (3rd Cir. 2006), does recognize an exception to the jurisdictional bar where constitutional claims are raised. Nevertheless, the Circuit Court determined that the exception was not applicable in the Petitioner's case because no constitutional challenge was raised by the Petitioner and, to the extent that such a claim was raised, it was deemed to be a "...bare allegation" that failed to assert any prejudice flowed from the asserted constitutional violation. [See, Appendix A at footnote 2]

The Petitioner asserts that the assertion of the Circuit Court that no facts or issues evidencing a constitutional violation or prejudice were raised in the administrative proceedings was error because the notice of appeal filed by Petitioner's former counsel outlined the error of the immigration court and outlined the prejudice to the Petitioner as the result of its preparation of the defective subpoena. On appeal, the Petitioner challenged the denial of the Petitioner's 212(c) relief application by the immigration judge and asserted that she had sought relevant and material evidence regarding her medical condition through subpoena, but that due to defects in the subpoena

prepared by the court, the sought documents were not made available prior to the final hearing before the immigration court. The Petitioner asserted that due to the court's error in preparing the subpoenas and the late notice to Petitioner of the defect, the immigration judge should have continued the case so as to correct the defect in the subpoenas and permit receipt of the requested evidence.

Petitioner asserts that the Board erred in determination regarding the subpoena. The evidence sought by the Petitioner was clearly available and would have been received but for the error of the immigration court in preparing the document, and its finding that the Petitioner had not established that the requested documents were material and or relevant was plain error as the immigration judge asserted that the documents were necessary in order for the Petitioner to receive favorable consideration of her application. As such, the determination of the Circuit Court that Petitioner failed to raise a sufficient constitutional claim or assert prejudice was plain error as the Petitioner was denied her right to due process in the administrative proceedings.

2. Proceedings Below-

The Petitioner is Christa Marie Labbe, born on November 13, 1963 in the nation of Haiti. The Petitioner entered the United States on or about April 13, 1986 as a lawful permanent resident. The Petitioner asserts that during his period of residence

in the United States she resided continuously in New York State. The Petitioner further asserts that she was placed into removal proceedings following a brief trip to Haiti to help a family member.

Pursuant to a notice to appear dated July 21, 2003, the Petitioner was placed into removal proceedings as the agency sought her removal pursuant to 8 U.S. C. section 1182(a)(2)(A)(i)(I). This charge was predicated upon the allegation that the Petitioner had been convicted on or about August 12, 1991, under NYPL 125.20, for manslaughter. The Petitioner admitted the allegations related to her alleged criminal offenses, as well as those relating to the charges of removal.

The immigration judge sustained the charges and allegations of removal, finding that the Respondent had met its burden of proof by clear and convincing evidence. The Petitioner then requested relief in the form of a waiver under
former INA section 212(c).

Prior to the conduct of the individual hearing, the immigration court prepared 3 subpoenas so as to permit the Petitioner to obtain medical and other evidence it required as support of her request for 212(c) relief. The subpoenas prepared by the court were defective, however, because they did not contain the Petitioner's date of birth or social security number. The subpoenas were returned to the court for correction and the Petitioner's counsel did not receive notice of the defects until three days prior to the final hearing in the case. The immigration court refused to reschedule the hearing date.

The Petitioner, and her aunt provided testimony

in support of Petitioner's application for relief from removal at individual hearings held on or about November 4, 2003, December 8, 2003 and January 15, 2004. The Petitioner and her witness provided testimony regarding her residence in the United States, including her family ties, her employment, her community involvement and service, as well as her criminal history in the United States. The Petitioner offered testimony regarding her manslaughter conviction. The Petitioner and her witness also provided testimony regarding these areas as well as the hardship to befall the family if the Petitioner was to be removed from the United States.

Notwithstanding the evidence and testimony presented by the Petitioner, the immigration judge denied the Petitioner's application for relief from removal asserting that not enough evidence regarding the Petitioner's assertion of rape, or the circumstances of her involvement in the manslaughter conviction had been presented to the court.

The Petitioner filed a timely appeal of the decision of the immigration judge, asserting that the findings of the immigration judge were an abuse of discretion and clearly erroneous as the evidence required by the court was not available due to the incorrect completion of the Petitioner's subpoenas by the court, that the court should have granted the Petitioner a continuance due to the court's error and that the failure to provide a continuance was an abuse of discretion.

On or about May 13. 2004, the Board of Immigration Appeals denied the Petitioner's appeal

finding that the Petitioner failed to present sufficient evidence to justify grant of her relief application. The Board offered no analysis of the adjudication of the relief application by the immigration judge, nor did it provide any adjudication of the Petitioner's assertion that the Petitioner was prejudiced by the fact that the defective subpoena prepared by the immigration court rendered it impossible for her to obtain the evidence the court required for favorable adjudication of her relief application. Petitioner's former counsel specifically stated that the Petitioner was prejudiced by the defective subpoena and by the refusal of the immigration court to permit Petitioner the opportunity to correct the defect and obtain the evidence in question.

Petitioner filed a petition for review with the US Court of Appeals for the Third Circuit challenging the dismissal of her appeal by the Board. The Petitioner asserted that the finding of the Board violated her right to due process of law and she asserted that she was prejudiced in the removal proceedings by the conduct of the immigration court.

The Court of Appeals, on or about September 21, 2007 dismissed the Petitioner's appeal finding that the Petitioner failed to present a valid constitutional issue or assert that she was prejudiced in the administrative proceedings. Further, on or about November 20, 2007, the Court of Appeals declined to grant the Petitioner's petition for rehearing.

REASONS FOR GRANTING THE PETITION

The Court of Appeals erred when it determined that the Petitioner failed to raise assert issues sufficient to support claim that her right to due process was violated and that she was prejudiced in the administrative proceedings. While it might have been correct that the Petitioner's motion for remand did not raise that claim adequately, it was without foundation ignoring the fact that the issues of due process and prejudice were asserted fully and clearly in the Petitioner's notice of appeal to the Board of Immigration Appeals.

An agency that fails to follow its own rules and regulations in the adjudication of a litigant's rights with respect to issues within its jurisdiction has denied the litigant a fundamentally fair hearing and has violated the due process rights of that individual. *Accardi v. Shaughnessy*, 347 US 260 (1954). Moreover, the Board of Immigration Appeals is charged with rendering decisions based upon the record developed by an immigration judge. *Abdulai v. Ashcroft*, 239 F.3d 542 (3rd Cir. 2001)

In the administrative proceedings, the immigration court prepared three subpoenas needed by the Petitioner to obtain evidence that the court required. Those subpoenas were defective in that they did not contain the Petitioner's date of birth or her social security number. The entities to whom the subpoenas were sent returned them to the court for correction of the defects. The immigration court only provided notice of the defect and rejection of the subpoenas

to the Petitioner's attorney three days prior to the scheduled individual hearing. The immigration judge then refused to reschedule the hearing to permit correction of the asserted defect and delivery of the required documents.

Due, in significant part to those errors, the information sought by the Petitioner was not obtained in a timely manner and the merits hearing was conducted without the requested documents. The immigration judge rejected the Petitioner's relief application, in substantial part, due to the fact that the evidence was not submitted to the court for consideration. The immigration judge stated: "...(T)his court...directed respondent's counsel to see about getting additional information that would help in the adjudication of this case...however, there is no evidence about the background of the conviction..." (AR 49) Though the immigration judge held the Petitioner to account for the lack of documentation, the immigration judge and the Board, ignored completely, the court's role in the set of circumstances that led to the Petitioner's inability to obtain the requested documents.

Though the Board asserted that the Petitioner presented no evidence that she could not obtain the documents sought by subpoena prior to the conclusion of the individual hearing, the evidence of the errors contained in the subpoenas prepared by the court were in fact known prior to the entry of a decision on the removal case by the immigration judge. Thus, the assertion by the Board was, contradicted by the record of proceeding.

The Petitioner's former attorney requested a subpoena to obtain the evidence requested by the immigration judge. (AR 287) The subpoenas were prepared by the immigration court and issued. (AR 288-294) The subpoenas prepared by the court were, however, defective, because they did not contain information regarding the Petitioner's birth date or social security number. (AR 2) The Petitioner's former counsel pointed out, the subpoena's were prepared by the court and he could not alter them and he only received notice that the subpoenas were defective three days prior to the individual hearing. (AR 28)

The Court of Appeals ignored these factual circumstances when it determined that the Petitioner did not raise a constitutional challenge or claim prejudice sufficient to permit it to assert jurisdiction to adjudicate the Petitioner's petition for review. With respect to the issue of prejudice, the error of the immigration court and the resulting delay in getting the evidence had a devastating impact on the Petitioner's ability to obtain the needed documents prior to the start of the individual hearing. This fact was noted by Petitioner's former counsel in the notice of appeal, yet the Circuit Board offered no explanation as to why this circumstance was insufficient to constitute prejudice and permit it to adjudicate the Petitioner's appeal.

The determination of the Court of Appeals was in contradiction to its own legal precedent as it has held that where Constitutional issues are raised, they are fully within the jurisdiction of this court. *Cruz v. Attorney General*, 452 F.3d 240 (3rd Cir. 2006)

Further, contrary to the assertions of the Circuit Court that the Petitioner did not establish the harm she sustained as the result of the Respondent's conduct to such a sufficient degree to rise to a constitutional violation, the act of the immigration court in preparing defective subpoenas which proved to be ineffective and the failure of the Respondent to correct its errors prior to determining that the Petitioner's evidence was insufficient was plain error on the part of the Circuit Court. Accordingly, its citation to *Khan v. Attorney General*, 448 F.3d 226 (3rd Cir. 2006) as justification for its denial of the Petitioner's appeal was misplaced.

Conclusion

The decision of the US Court of Appeals for the Third Circuit in asserting that it lacked jurisdiction to consider the Petitioner's appeal ignored the precedent set forth by this court in *INS v. St. Cyr* (supra), and its own precedent in *Cruz v. Attorney General* (supra), finding that notwithstanding the efforts of Congress to strip federal courts of jurisdiction to hear appeals of criminal aliens, federal courts retain jurisdiction to consider such appeals where constitutional claims are presented. The administrative record fully supported the Petitioner's assertion that the facts upon which her constitutional claims are based were fully presented to the Board of Immigration Appeals and yet they were ignored. Accordingly, the issues were fully ripe for adjudication by the Court of Appeals.

Review of this appeal by this court is essential as the decision of the Court of Appeals reveals confusion regarding the extent to which federal courts may exert jurisdiction over the appeals of criminal aliens and whether the Respondent's errors that affect the outcome of removal proceedings constitute sufficient grounds for an alien's assertion that such errors prejudice his right to due process of law in removal proceedings.

Sincerely,

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(717) 843-0417 fax
Attorney For Petitioner,
Christa Marie Labbe

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-5372

CHRISTA LABBE,
Petitioner
V.
ATTORNEY GENERAL OF THE UNITED STATES,
et. al.
Respondent

On Petition for Review of a Final Decision
Of the Board of Immigration Appeals
BIA No. A40-136-414
Immigration Judge Grace A. Sease

Submitted Pursuant To Third Circuit LAR 34.1(a)
September 19, 2007

Before: SLOVITER, SMITH and GARTH, Circuit Judges
(Filed September 21, 2007)

OPINION

SMITH, Circuit Judge

Christa Labbe is a native and citizen of Haiti. She entered the United States in 1986 and lived with her maternal aunt. She returned to Haiti in July of 2003 and upon reentering the United States later that month was found to be inadmissible as a criminal alien under 8 USC section 1182(a)(2)(A)(i)(I) for having committed a crime involving moral turpitude.[1] At a hearing before an immigration judge ("IJ"), Labbe conceded that she had been convicted in 1991 in New York State of first degree manslaughter for killing her newborn son by means of strangulation, and that she was removable. To avoid deportation, Labbe sought relief under former section 212(c) as she had been a lawful permanent resident for many years and had not been incarcerated for more than five years.

Because Labbe could not be considered for bail, the IJ granted counsel's request to schedule her case in short order. During a hearing in November of 2003, ti was evident that
medical documentation regarding Labbe's condition at the time of her child's birth would be helpful in adjudicating her claim. Yet counsel failed to adduce any such records during the hearing in December of 2003. After additional testimony was taken, the IJ directed counsel to obtain a release for Labbe's medical records. Thereafter, counsel sent a request to the IJ to issue

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[1] Though the record also shows that Labbe traveled outside of the US twice in 2002, it is unclear why Labbe was not denied admission back to the U.S. on either of those two occasions.

subpoenas to three hospitals. The immigration court completed the subpoenas based on information provided by counsel and returned them to counsel to serve upon the hospitals. The subpoenas mirrored the information supplied by counsel. As a result, Labbe was identified by only her name and her immigration file number.

One hospital responded that it had no records for Labbe. The second hospital asked for additional information to identity whether it had any records for Labbe. The third hospital did not respond. Those responses were provided to counsel shortly before the final hearing in January 2004. Despite counsel's awareness that the responses were less than complete, no request was made for a continuance. Thereafter, the IJ issued a decision denying Labbe's request for discretionary relief under former section 212(c).

Labbe filed a timely appeal with the Board of Immigration Appeals ("BIA"). She did not challenge the denial of her application for relief under former section 212(c). Instead, she asserted that the IJ erred by failing to sua sponte grant a continuance which would have allowed counsel to obtain the desired medical records. Labbe requested that the BIA remand her case for further proceedings. The BIA denied the request, explaining the Labbe had failed to establish that these medical records were unavailable as required under 8 C.F.R. section 1003.2(c), and that such records even contained information that would be helpful to her claim.

Labbe did not file a petition for review. Instead, slightly more than thirty days later, she filed a petition

under 28 U.S.C. section 2241 in the District Court. Consistent with the REAL ID Act, the petition was transferred to this court and treated as a petition for review. See *Bonhometre v. Gonzales*, 414 F.3d 442, 446 (3rd Cir. 2005).

Before us, Labbe argues that the BIA erred by dismissing her appeal as it failed to provide any legal analysis of the IJ's decision denying her application for relief under former section 212(c). As a result, she contends her right to due process was violated. Labbe further asserts that the BIA erred by concluding that she did not adduce a good reason for failing to produce her medical records and by denying her request to remand for further proceedings. The government contends that we lack jurisdiction to review Labbe's petition on several grounds.

We agree with the government that jurisdiction is lacking. Labbe petitions for review of the IJ's denial of her application for relief under former section 212(c), a discretionary benefit that was available prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act. See *I.N.S. v St. Cyr*, 533 U.S. 289, 325 (2001) (observing that "section 212 (c) relief is discretionary"). Section 1252(a)(2)(B)(ii) strips the courts of appeals of jurisdiction to review "any other decision or action of the Attorney General... which is...in the discretion of the Attorney General..." 8 U.S.C. section 1252(a)(2)(B)(ii). Accordingly, we lack jurisdiction to review the IJ's denial of Labbe's application for relief under former section 212(c). *Avendano-Espejo v. Dep't of Homeland Sec.*, 448 F.3d 503, 505 (2d cir.2006)

There is an exception to this jurisdictional barrier in 8 U.S.C. section 1252(a)(2)(D) for petitions presenting "constitutional claims or questions of law..." Labbe has alleged in her brief a violation of her due process rights because the BIA failed to address the merits of the IJ's decision as it pertained to her application for section 212(c) relief. This exception for constitutional claims, however, does not come to her aid because section 1252(d)(1) requires that an alien exhaust her claims. Labbe's notice of appeal to the BIA did not mention the denial of her application for relief under former section 212(c). To be sure, there are occasions where a due process claim need not be exhausted, but in this case Labbe's claim implicated the agency's administrative process and the agency was capable of correcting any procedural error in that regard. Thus, the failure to challenge the IJ's denial of her application for 212(c) relief was fatal and we many not consider this unexhausted claim. *Bonhometre*, 414 F3d at 447-48.

Jurisdiction is also lacking under 8 U.S.C. section 1252(a)(2)(C), which instructs that

" no court shall have jurisdiction to review any final order of removal against an alien who is removalble by reason of having committed a criminal offense covered in section 1182(a)(2)." In *Papageorgiou v. Gonzales*, 413 F.3d 356, 357 (3d Cir. 2005), we reiterated that there are only two predicate facts to establish before applying section 1252(a)(2)(C)'s jurisdictional bar. "[F]irst, whether a petitioner is in fact an alien, and, second, whether he or she is indeed

removable by reason of having been convicted of one of the enumerated offenses" in section 1252(a)(2)(C). Id. Here, there is no dispute that Labbe is an alien. The record before us establishes that Labbe was charged as being removable for an enumerated offense, i.e., a conviction for manslaughter in the first degree, which constitutes a crime of moral turpitude under section 1182(a)(2)(A)(i)(I). Because Labbe does not contest that her conviction constitutes an enumerated offense under this jurisdictional provision, section 1252(a)(2)(C) bars us from reviewing this aspect of her petition.

We recognize that Labbe's appeal to the BIA asserted that the IJ erred by failing to sua sponte grant a continuance to allow more time to obtain the hospital records and that the notice of appeal specifically requested a remand to the IJ. There is a distinction barring a criminal alien's petition seeking a review of the merits of the BIA's denial of her application for relief under former section 212(c) and a petition challenging the denial of a motion to reopen. For that reason, we must determine if the denial of a motion to reopen is reviewable in light of section 1252(a)(2)(C)'s jurisdictional stripping provision.

We have not directly considered whether section 1252(a)(2)(C)'s bar also precludes us from reviewing a motion to reopen a criminal alien's immigration proceedings. In *Cruz v. Attorney General of United States*, 452 F.3d 240 (3rd Cir. 2006), we considered a petition for review of the denial of a motion to reopen by an alien convicted of a crime of moral turpitude. There we were unable to determine if section

1252(a)(2)(C) precluded our review of the motion to reopen because the BIA's decision failed to analyze whether the alien had the predicate conviction for an enumerated offense in light of the state court's vacatur of that conviction. Id. At 247-48. For that reason, we granted the petition for review and remanded the matter for further proceedings.

Nonetheless, *Cruz* is instructive because we observed that, even though an order denying a motion to reopen is generally reviewable, there are:

> certain situations in which jurisdiction-stripping provisions of 8 U.S.C. section 1252(a)(2) limit or eliminate our jurisdiction to review denials of motions to reopen. For example, if an alien is removable for having committed one of the offense enumerated in 8 U.S.C. section 1252(a)(2)(C), we lack jurisdiction to review a denial of a motion to reopen, except to the extent that it raises constitutional claims or questions of law. 8 U.S.C. section 1252(a)(2)(C)(D)...

Cruz, 452F3d at 246-47 (internal footnote and citations omitted)

Consistent with *Cruz*, we conclude that the jurisdiction- stripping provision in section 1252(a)(2)(C) not only precludes us from reviewing the IJ's denial of her application for section 212(C) relief, it also precludes our review of the motion to reopen unless Labbe has raised an issue of law or a

constitutional claim. Neither are present in Labbe's challenge to the BIA's denial of the motion to reopen.[2]

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[2] Labbe alleged in the final paragraph of her argument on the motion to remand that the Board violated her right to due process when it recognized the deficiency in the subpoenas, yet refused to grant relief. This bare allegation fails to state a colorable violation of the United States Constitution. As we explained in *Khan v. Attorney General of United States*, 448 F.3d 226,236 (3rd Cir. 2006), recasting a challenge to a discretionary determination as a due process violation is
inadequate as an alien must show that he was prevented from reasonably presenting his claim and that he was prejudiced as a result thereof. Labbe cannot make either showing. The record establishes that Labbe never sought a continuance from the IJ even though her counsel knew the subpoenas were not productive, and she failed to adduce before the BIA any medical documentation that would have demonstrated that she was prejudiced.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Case No.: 05-5372

CHRISTA LABBE,
Petitioner

V.

ATTORNEY GENERAL OF THE UNITED STATES; SECRETARY OF DEPARTMENT OF HOMELAND SECURITY; THEODORE NORDMARK, Senior Officer Of The Local Branch of Bureau of Customs and Immigration Enforcement,
Respondent

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, and GARTH, Circuit Judges*

The petition for rehearing filed by petitioner in the above-entitled case having been submitted to the judges who participated in the decision of this Court

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*The vote of the Honorable Leonard I. Garth, Senior United States Circuit Judge, is limited to panel rehearing.

and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in thedecision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,
/s/ D. Brooks Smith
Circuit Judge

Dated: November 20, 2007
CRG/cc: Sandra L. Greene, Esq.
Daryl L. Bloom, Esq.

US Department of Justice
Executive Office For Immigration Review
Falls Church, Virginia 22041
Decision of the Board Of Immigration Appeals

May 13, 2004

File: A40-136-414 - YORK
In re: LABBE, CHRISTA MARIE
IN REMOVAL PROCEEDINGS
APPEAL
ON BEHALF OF RESPONDENT:
Kleefield, Claude H., Esquire
ON BEHALF OF DHS:
Maureen C. Gaffney, Assistant Chief Counsel

ORDER:

PER CURIAM. The respondent has appealed from the immigration judge's decision dated January 15, 2004. The respondent seeks a remand for an additional opportunity to provide evidence from hospitals at which she was treated in support of her 212(c) application. On December 20, 2003, the respondent submitted a motion requesting the Immigration Court to issue subpoenas to the hospitals to help obtain the respondent's medical records. The subpoenas were unsuccessful, however, apparently due in part to the subpoenas failure to include the respondent's social security number and date of birth. The respondent has not adequately demonstrated that this evidence was unavailable during the proceedings below, however. See 8 C.F.R. section 1003.2(c)(1). The respondent

first appeared before the Immigration Court on August 20, 2003, indicating an application for section 212(c) relief would be filed and a decision was not issued until January 15, 2004.(Tr. At 5). Additionally, the respondent has not sufficiently indicated what the respondent's medical records will show or how they will affect the respondent's eligibility for section 212(c) relief. Accordingly, the appeal is dismissed.

Frederick D. Hess

For the Board

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Supreme Court, U.S.
FILED

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William K. Suter, Clerk

No. 08 -

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vs.
Michael B. Mukasey, US Attorney General
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On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Third Circuit

AMENDED APPENDIX

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Christa Labbe

Table of Contents:

Decision Of The Immigration Judge..... A-1 - A-14

A-1

US DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
York, Pennsylvania

File A40 136 414 January 15, 2004

In The Matter Of

CHRISTA MARIE LABBE,) IN REMOVAL
Respondent) PROCEEDINGS
)

CHARGE: Section 212(a)(2)(A)(i)(I)
APPLICATION: Section 212(c) waiver, deportability, waiver of inadmissibility
ON BEHALF OF RESPONDENT:
Andrew J. Wilson, Esquire
ON BEHALF OF DHS:
Maureen Gaffney, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

The respondent is a 40 year old female native and citizen of Haiti who entered the United States as a legal permanent resident on or about August 13, 1986. On July 21, 2003, the Bureau of Immigration and Customs Enforcement instituted proceedings with the issuance and service of a Notice To Appear. In that Notice to Appear, the respondent was charged with being subject to removal pursuant to the provisions of Section 212(a)(2)(A)(i)(I). This charge was predicated upon her conviction on August 12, 1991 for the crime of first degree manslaughter. On August 20, 2003, the respondent admitted the charges in the Notice to

Appear, and the Court found removability as charged. Removability was established by clear and convincing evidence. See Woodby v. INS , 385 US 276 (1966). The respondent sought relief from removal in the form of Section 212 (c) waiver of removability pursuant to the holding in the United States Supreme Court in St. Cyr.

II. DOCUMENTARY EVIDENCE

The documentary evidence in this case consists of the following.

Exhibit 1, the Notice to Appear.

Exhibit 2, the Department of Homeland Security's notice of intent to offer evidence, Tabs 1 through 3.

Exhibit 3, the Form I-191.

Exhibit 4, EOIR 42-A.

Exhibit 5, frivolous warnings.

Exhibit 6, respondent's supporting documentation.

Exhibit 7, the relevant New York State statutes.

Exhibit 8, September 22, 2003 letter from the respondent's attorney stating that there was no asylum claim.

Exhibit 9, mental heath assessment of the respondent by Dr. Michael Vogel.

Exhibit 10, additional evidence submitted on behalf of the respondent, January 10, 2004.

Exhibit 11, a letter from St. Mary's Hospital in response to a subpoena.

Exhibit 12, a letter from Hudson Valley Hospital in response to a subpoena.

III. SUMMARY OF THE EVIDENCE, OF THE TESTIMONY AND STATEMENT OF THE FACTS

The respondent and her aunt testified in this hearing. The respondent testified that she was born on November 13, 1963 in Beniere, Haiti. She has no children now. She had one child who was born in 1990 on March 9th of that year. The child is now dead.

The respondent testified when asked about the death of her child, that she was depressed after a conversation with her mother and was crying, when the roommate came to the room and found her bed full of blood. Her aunt tried to pick her up. She took her to St. Mary's Hospital, asking her what happened that night. She was taken to the hospital the same day she gave birth to the baby, and the baby the same day. The Baby was born at home. The respondent said she was depressed when they came to her and the baby was dead.

The respondent testified that she doesn't know why she killed the baby. She was told that she killed the baby at home by squeezing the neck of the baby. It was an eight month pregnancy. She stayed under the doctor's care for a long time after going to the hospital. The respondent said that she was raped her last month of high school in 1989. She does not know who raped her, nor did she report the rape to the police. She told a friend about the rape. At that time she was living with her aunt and didn't tell her because of the culture and because she was ashamed. She said she was going to school, because she wanted to be a nun and had wanted to be a nun since the age

of six. She said the rapist grabbed her when she was returning home from school. After the incident she went home, and she said she sat there crying for a long time. As stated previously, she said she did not tell her aunt or anybody about the incident, because she was ashamed.

She said one day after the incident, she was on the bus and heard ladies talking on the bus about pregnancy and about not getting their period. So she then went to the hospital to see a doctor. She didn't tell anyone, because she had no one to tell about the incident. When asked how was she able to conceal her pregnancy, she said no one in the family knew that she was pregnant. Apparently people in the household tended to keep odd hours working and going to school. She didn't see her aunt very much. Although she was sharing a room with her aunt's other niece, the respondent said she always covered herself up when she was around others so that nobody knew that she was pregnant.

The respondent could provide very little actual information about the incident that led to her arrest and conviction. She became quite agitated when asked about the incident. She said that her aunt took her to the hospital the next day, and she was given blood transfusions when she was taken to the hospital. She described her state of mind as dizzy and drowsy. She said she reduced herself to a very small person.

In response to questioning by the Government attorney, she said that an ambulance came to the house, because the other niece saw her lying in pool

of blood in her bed and called the ambulance. In any event, the respondent was taken to the hospital, and according to the respondent, she was given transfusions and place in intensive care. She was very sick at the time. She was asked about the baby, and the medical personnel told her that the baby was dead. She was kept at the hospital from the 9th through the 13th, and her cousin picked her up. Charges were brought against her for the death of her baby on June 20, 1990. She was in jail for a while, andthen on August of 1990 was sent to a mental health facility for 90 days and then to another center for perhaps six months. She served three years and a few months in the New York State prison system. She was at Bedford Hills in Albion. She said while she was there she took classes and saw a doctor there. She took classes in parenting, family violence and earned lots of certificates in things such as cosmetology, hospice care, and life skills. One of the conditions, she said, of her parole was that any time she was depressed, she had to go see to a doctor.

She said that she has been going to school, and she attended a lot of classes while in prison, and was going to school once she got out of prison. She also says that she attends church and goes to church to pray. She would like to continue going to school and get a degree in human services. She described her earnings a variable. She has been working as a home health aide. She said she had four brothers, one of whom recently died, which is apparently why she had returned to Haiti; and two sisters, one of whom has disappeared. She has siblings living in Haiti. She is the

main support of her siblings.

Since 1986 she has lived the majority of the time with her aunt and uncle, when she has not been incarcerated. She said that ifshe returned to Haiti, they would kill her after the death of her brother. She went back once because of sickness and death in the family. Her mother had a house that she left to Christa and her brother. She said that people might want to kill her for the house. She doesn't think she would do anything in Haiti, because it's not easy to get a job.

She has successfully completed her probation. She has no arrests and no convictions. She expressed remorse or her actions.

The Respondent's aunt, Otiana Lafortune, also testified in the respondent's behalf. Her aunt said that she lives in Brooklyn. She is married. She lives with her husband, who is 84 years old. She said that the respondent is her niece, the daughter of her sister. The respondent came to the United States in 1986 and has been living with them ever since. The aunt testified that she was not aware that her niece was ever pregnant. She has another niece who was living with her when Christa was pregnant, and they shared the same room. Nobody knew, she reiterated, in the family that the respondent was pregnant. She said the respondent was attending school in Manhattan and that she was working. She said the respondent was the one who worked to help the resp of her siblings in Haiti.

She said the morning of the incident, she was on her way to work when the respondent said she didn't fee very good and asked for the witness to take her

to the hospital. The aunt said she took the respondent to the hospital but didn't stay with her. Subsequently, a baby was found in the house. The police came. The respondent was kept in the hospital for a few days. Then she was released. The aunt testified that she rented a room for her niece nearby, because she thought it would be better, because everyone was talking about the situation, and there was a lot of criticism and a lot of attention.

The respondent, she testified was questioned by the police. She does not know if there was ever any autopsy done on the baby. She said the other niece, who was sharing a room with the respondent, didn't know anything about the pregnancy and simply woke up and saw blood in the bed. She doesn't know if there was ever any newspaper stories about the death of the baby. She said that when the respondent was in prison, she would go upstate to visit her. She said after the respondent was released, social workers used to come to see her. She doesn't know if the respondent went to see a psychologist or psychiatrist herself. She said that the respondent went back to work and went back to school after her release. She has not been in trouble since then. She said that the respondent goes to church regularly, but she doesn't really know what church she goes to, although the aunt said that she herself is Seventh Day Adventist, and that her pastor used to call and talk to the respondent on the phone.

IV. SECTION 212(c) WAIVER

STATEMENT OF THE LAW

Section 212 (c) of the Immigration and

Nationality Act provided in pertinent part that an alien lawfully admitted for residence, who temporarily proceed abroad voluntarily and not under an order of deportation , and who in returning to a lawful unrelinquished domicile of seven consecutive years may be admitted in the discretion of the Attorney General without regard to certain specific grounds of exclusion in Matter of Silva, 69 I&N Dec. (BIA 1976). The Board of Immigration Appeals adopted the reasoning of the United States Court of Appeals for the 2nd Circuit in Francis v. INS, 532 F.2d 268 (2nd Cir. 1976), holding that lawful permanent resident is prima facie eligible to apply for relief from deportation, even if she has not proceeded abroad subsequent to the act which rendered him or her deportable. The Board extended the availability of Section 212(c) relief to eligible aliens in deportation proceedings, for whom a comparable ground of excludability exists. See Matter of Hernandez-Casillas, 20 I&N Dec. 262 (BIA 1990). In 1990, Congress amended Section 212(c) to restrict the availability of this form of relief to any alien who has been convicted of one or more felonies and served a term of imprisonment of at least five years. In Scheidemann v. INS, 83 F.3d 1517 (3rd Cir. 1996), the 3rd Circuit held that this five year bar applied to post enactment convictions. Although eligibility to apply for Section 212(c) was limited by the passage of the Anti-Terrorism and Effect Death Penalty Act, the Supreme Court held in INS v. St. Cyr, 121 US 2271 (2001) that Section 212 (c) relief remained available for

those aliens whose convictions were obtained by plea agreement and who would have been eligible for Section 212 (c) relief at the time they entered a plea. To be eligible for Section 212(c) relief, a respondent has the burden of demonstrating that he was admitted to the United States as a permanent resident, that he has seven years continuous residence in the United States, and that he merits a favorable exercise of discretion. A favorable exercise of discretion in a particular case involves the balancing of the positive social and humane considerations in favor of a waiver against the adverse factors evidencing the respondent's undesirability as a permanent resident. Matter of Marin, 16 I&N Dec. 578, 584 (BIA 1978) Positive considerations include such things as family ties within the United States, lengthy residence in the United States, which includes when the residence began at a young age, evidence of hardship to the respondent or his family if deportation occurs, service in the armed forces, a history of employment, strong property and community ties, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to the respondent's good moral character.

A section 212(c) applicant with a criminal record will ordinarily be required to demonstrate evidence of rehabilitation before a favorable exercise of discretion. Rehabilitation is a significant discretionary factor in these instances. See Matter of Roberts, 29 I&N Dec. 294 (BIA 1991). See also Matter of Arreguin, 21 I&N Dec. 38 (BIA 1995). Adverse factors include the

nature and underlying circumstances of the exclusion or deportation grounds at issue, evidence of significant violations of the nation's immigration laws and the existence of a criminal record. Moreover, one or more of these adverse factors may be ultimately determinative of whether 212(c) relief is usually granted in a particular case. Matter of Marin, supra. The demonstration of unusual or countervailing equities does not mandate the favorable exercise of discretion. Rather, absent such equities, relief will not be granted in the exercise of discretion. Matter of Buscemi, 19 I&N Dec. 628 (BIA 1998).

The Attorney General in Matter of Jean , 23 I&N Dec. 373 (A.G. 2002) addressing an issue involving a Section 601 waiver, which was necessary to allow an individual to adjust her status from refugee to lawful permanent residence, the Attorney General noted that aliens who have committed violent or dangerous crimes will not be granted a discretionary waiver to permit their adjustment of status. The Attorney General goes on to say at page 383 of this decisioon that in my judgment, that is to say his judgment, the balance will nearly always require the denial of a request for a discretionary relief from removal where an alien's criminal conduct is as serious as that of the respondent. It should be noted that Mrs. Jean had been convicted of recklessly shaking a child in her care, so that the child subsequently died. The Attorney General stated that it would not be a prudent exercise of the discretion afforded me, that is to say the Attorney General, to grant favorable adjustments of status to

violent or dangerous individuals, except in extraordinary circumstances, such as those involving national security or foreign policy considerations or cases in which an alien clearly demonstrates that the denial of status adjustment would result in exceptional and extremely unusual hardship.

In the instant case, the Court finds that the respondent was lawfully admitted for permanent residence for the requisite number of years; that she was convicted by virtue of a plea; that she served less than five years; that the date of the plea was June 21, 1991. In terms of the Marin factors, the Court finds that the United States has been in the United States for 17 years. While she has family members here, her closest family member here is that of her aunt, whom she describes as being like a surrogate mother. The respondent appears to have worked fairly consistently in the United States. Her criminal history is the one mentioned charge, the conviction of manslaughter for the death of her child. Her behavior in prison has apparently been excellent. The hardship to family members in the United States should she be removed appears to be somewhat limited. Her present lifestyle, she apparently prior to being apprehended is working and going to school. She has siblings in Haiti that she has seen and apparently has a good relationship with. Respondent's health appears good. She does not appear to own a significant amount of property. Her community activities, according to her, largely consist of her membership in the church. The respondent has established a clear record of rehabilitation. The

problem of course, is that the respondent's crime is of manslaughter involving an infant is one which is regarded as particularly heinous.

In order for a favorable exercise of discretion, the respondent would have the burden of establishing that the circumstances of the offense were such, or that her state of mind was such that there were unusual circumstances that led to her arrest and conviction. The court cannnot exercise its discretion absent the ability to find extraordinary circumstances surrounding her conviction.

In this instance, the respondent does, it is true, have substantial equities in the United States. However, she has failed to establish the necessary unusual or countervailing equities that would be necessary for a Section 212(c) grant. It should be noted that this Court continued this case a number of times and directed respondent's counsel to see about getting additional information that would help in the adjudication of this case. This Court is sympathetic to the respondent. The respondent certainly seems to be fully rehabilitated. However, the Court cannot, and while there are significant questions about the conviction, there is no evidence about the background of the conviction. The testimony of the aunt was of a limited utility in trying to shed light on the conviction. The respondent herself cannot discuss the nature and circumstances of the offense, thereby leaving the court no other option but simply to look at the words on the conviction document, manslaughter, and manslaughter of the infant. This is insufficient to raise this evidence

that would allow the Court to make any kind of finding of unusual and extraordinary circumstances are present.

In adjudicating any application for a waiver such as this, the Court may look behind the record of the conviction to look at the circumstances surrounding the conviction. However, the Court has been provided absolutely no information about the circumstances surrounding the conviction. The Court cannot create out of whole cloth the circumstances surrounding the conviction. The Court cannot infer from silence the circumstances surrounding a conviction. Accordingly, although the Court is quiet sympathetic to the respondent and does believe that she has evidenced full rehabilitation, that in and of itself is insufficient for a grant of this waiver, given the nature of her conviction. There is no evidence that she was raped, for example. There is no evidence of her state of mind. There is no evidence about the nature and substance of the offense itself. Accordingly, the Court has no option but to deny the respondent's request for a 212 (c) waiver and to order that she be removed to her home country of Haiti. Done and ordered. Accordingly, the following orders are entered.

ORDER

IT IS ORDERED that the respondent be and is found removable pursuant to Section 212(a)(2)(A)(i)(I).

IT IS FURTHER ORDERED that the respondent's application for a Section 212(c) waiver be and the same is hereby denied.

A 40 136 414 January 15, 2004

IT IS FURTHER ORDERED that she be removed to her home country of Haiti.

Done and ordered this 15th day of January 2004.

Grace A. Sease
Immigration Judge